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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses

WT Docket No. 97-82

I. INTRODUCTION

II. THE COMMISSION SHOULD ADOPT MANY OF THE RULES PROPOSED, WITH SOME CLARIFICATION AND MODIFICATION

There appears to be considerable support among commenters for the Commission's proposal to include in the reauction disaggregated spectrum and all

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licenses surrendered by the election date as well as all PCS C block licenses held by the Commission as a result of previous defaults.² As stated in its comments, NextWave also agrees with this approach.

NextWave also notes that several commenters agree that \$.06 per MHzPOP is an unnecessarily high upfront payment for this auction,³ and would represent a barrier to entry for entrepreneurs. We agree with Conestoga Wireless Company that “[t]ripling the upfront payment amount is excessive and will restrict the ability of small businesses to participate in the reauction.”⁴

B. The Commission Should Clarify That Eligibility for Bidding Credits Will Be Determined on the Basis of Revenues for the Years Immediately Proceeding the Reauction

NextWave continues to believe that all C block licensees should be permitted to fully participate in a reauction.⁵ However, the Commission should reject Omnipoint’s suggestion that all entities, whether or not they would be currently eligible under the rules, should be permitted to take advantage of bidding credits that would have been available to them at the time of the original C block auction. Omnipoint cites the Commission’s Fifth Memorandum Opinion and Order in the auction proceeding as providing assurances that an entity that grows as a result of operations would continue to

² See, e.g., Comments of AirGate Wireless L.L.C. at 2; Comments of Conestoga Wireless Company at 7; Comments of Omnipoint Corporation at 4; Comments of Richard L. Vega Group (on behalf of Duluth PCS, Inc., St. Joseph PCS, Inc. and West Virginia PCS, Inc. at 1.

³ Comments of AirGate Wireless L.L.C. at 7; Comments of Conestoga at 5.

⁴ Comments of Conestoga at 5.

⁵ As stated in its comments to this proceeding, NextWave urged the Commission to reconsider its decision to bar a C block licensee who chooses the disaggregation or prepayment option from applying in a reauction for its disaggregated or returned C block spectrum. Comments of NextWave at 3-4.

be “eligible.”⁶ NextWave disagrees with Omnipoint’s assertion that such language can be interpreted to mean that an entity that holds Entrepreneur’s Block licenses, but is otherwise ineligible to participate in a reauction, could use bidding credits. In fact, the Commission’s statement in the Fifth Memorandum Opinion and Order was meant to clarify that entrepreneurs would be allowed to continue to hold Entrepreneurs’ Block licenses, or acquire them in the aftermarket, even if they were no longer eligible to participate in any future Entrepreneur’s Block auction.⁷

The Commission clearly permits the participation of entities that would otherwise be ineligible to participate in a reauction, since, in one of the few rule changes the Commission adopted in the *Second Report and Order*, it affirmatively adopted a rule to permit such entities’ participation in the upcoming reauction.⁸ However, the Commission proposes to adopt the same categories for bidding credits as it had in the F block, and did not change or propose to change the rules that state that an entity’s eligibility for such bidding credits is determined by the immediately preceding years’ revenues.⁹ While it is reasonable for all C block licensees to be allowed to participate in a reauction, the Commission should clarify that, contrary to Omnipoint’s assertion, licensees that exceed the revenue caps and no longer qualify as small businesses should be precluded from the

⁶ Comments of Omnipoint at 3.

⁷ See *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Memorandum Opinion and Order, PP Docket 93-253, 10 FCC Rcd 403 (1995) at para. 125.

⁸ *Second Report and Order*, Appendix B. “In addition to entities qualifying under this section any entity that was eligible for and participated in the first auction for frequency block C, which began on December 18, 1995, will be eligible to bid in a reauction of licenses for frequency block C conducted after March 31, 1998.” 47 C.F.R. §24.709 (b)(9)(i).

⁹ 47 C.F.R. §24.717 (a),(b) and 47 C.F.R. §24.720 (b).

use of bidding credits as it would unfairly advantage these larger, better capitalized, entities, and would undermine the purpose of the bidding credits.

C. The Commission Should Treat All C Block Licensees Equally With Regard to the Election Date

Omnipoint states early in its comments that it is “especially critical for the Commission to treat the re-auction participants equally in every respect to the initial auction.”¹⁰ Yet a few pages later, Omnipoint suggests that NextWave does not deserve such “equal treatment,” and that the Commission should reconsider its decision in the *Second Report and Order* that requires that all C block licensees simultaneously make their election decision and require NextWave to make its election prior to all other licensees making their elections.¹¹ This is an unbridled attempt to “game” the auction rules to Omnipoint’s benefit, in order to give it and other C block licensees what can only be seen as a competitive advantage. Omnipoint does not even try to conceal the lack of public policy benefit. The Commission should treat Omnipoint’s proposal accordingly.

If anything, the Commission should require Omnipoint to choose first. As the beneficiary of a pioneer’s preference for spread spectrum technology, the only C block licensee that has successfully accessed the public financial markets and, as a result, one of the few C block licensees that has been able to build out major C block markets, Omnipoint is clearly a market leader. As such a market leader, Omnipoint’s opinion on license valuations, as expressed through its choice of options on the January 15 election

¹⁰ Comments of Omnipoint at 2.

¹¹ *Id.* at 5

date, could be seen as a critical to other C block licensees' understanding of the state of the C block market.

D. Only C Block Licensees or Otherwise Eligible Entities Should be Permitted to Participate in a Reauction

The Commission should reject Nextel's request that the Commission abandon its Entrepreneur's Block policy. To date, Nextel's comments in this docket would have you believe that it is only concerned about "reliability and integrity of spectrum licensing through competitive bidding"¹² and the Commission's "duty to enforce its rules."¹³ However, its comments regarding eligibility to participate in a reauction reveal clearly that Nextel is motivated primarily to gain access to spectrum for which it was previously ineligible. Nextel would have the Commission turn its back on policies that encourage diversity and competition in the wireless industry, and adopt a plan that ensures that the spectrum will go to the "entrenched" players. These suggestions are insulting to the Commission, and the many entrepreneurs in this industry that have, despite the odds, "competed effectively against the likes of" larger, well-financed companies.¹⁴

In its comments, Nextel equates entrepreneurship with niche or geographically-limited services,¹⁵ a definition that belies its own entrepreneurial origins. Now that Nextel, a once-small business that the Commission helped form through interpretation of

¹² See e.g., Reply of Nextel Communications, Inc., WT Docket No. 97-82, (July 8, 1997) at 15.

¹³ *Id.* at iii.

¹⁴ Comments of Nextel at ii.

¹⁵ *Id.* at 11.

its rules, has joined these ranks of the entrenched players, it would have the Commission alter its rules to close out others from entering this market.

Nextel is clearly wrong, as a matter of law, to claim that the Commission can meet its obligation under the Communications Act of 1934 without setting aside the C block for entrepreneurs. An expressed goal of the Communications Act is to ensure that “new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses. . . .”¹⁶ Nextel instead would have the Commission encourage excessive concentration and limit the dissemination of licenses by ensuring that these licenses go to incumbent players rather than new entrants. That result cannot be squared with the Communications Act.

The Commission should not consider adopting rules that eviscerate its policies implementing the Congressional mandate of avoiding concentration of licenses and disseminating licenses among small businesses. The PCS Entrepreneur’s Blocks are at the heart of this policy. Furthermore, such a wholesale change in the letter and the spirit of the Commission’s rules would completely undermine any opportunity to achieve success for the remaining entrepreneurs among C block licensees.

¹⁶ 47 U.S.C. §309(j)(3)(B).

III. COMMENTERS' ARGUMENTS REGARDING MINIMUM BID PRICES REVEAL THEIR TRUE MOTIVATION

The Commission should examine carefully comments submitted to this proceeding, particularly those arguments several commenters put forward to convince the Commission not to adopt a rule to set minimum bids at 10 percent of the C block prices. In the first place, parties' comments to the *Further Notice* seem inconsistent with the same parties' comments elsewhere in this docket. While several of these commenters object to tying minimum bids to 10 percent of C block prices as too high or overvalued,¹⁷ elsewhere commenters are on the record as implying that they or other bidders would have been willing to pay much more than this amount, if only given the opportunity.¹⁸

More importantly, some comments appear to reveal a change of position on certain key issues. It is important that the Commission note these apparent changes in position, since in some cases, the original position clearly influenced the Commission's decisions in the *Second Report and Order*. For example, earlier in this docket, Omnipoint repeatedly claimed that the financial difficulties facing the C block were temporary in nature, that there was "no justification for permanent restructuring at this time," and thus any more permanent relief would be unfair – licensees would get a windfall from any such relief.¹⁹ At one point, Omnipoint stated that, "[i]t is plausible

¹⁷ See, e.g., Comments of AirGate at 7-9, Comments of Conistoga at 4, Comments of Cook Inlet Region, Inc. at 10, and Comments of Omnipoint at 5-6.

¹⁸ E.g. AirGate states, "at differing discount levels, other bidders would have out bid the current C block licensees." Letter to Mr. William Caton from Shelley Spencer, WT Docket No. 97-82 (July 25, 1997), Attachment at 3. No discount level in AirGate's analysis brings C block prices to a level as low as the Commission's suggested minimum bid of 10% of the C block final bid prices, yet AirGate claims that there would have been many takers at such higher discount levels.

¹⁹ See e.g. letter to William F. Caton from Mark J. O'Connor, WT Docket No. 97-82, (July 16 1997, July 21, 1997, July 28, 1997, August 4, 1997) at Appendix. "Temporary Changes in (continued)

that, in one year the licenses will be as valuable as they ever were.”²⁰ Yet in its comments to *Further Notice*, Omnipoint argues that the Commission should not set minimum bid prices at 10 percent of C block prices because “in some significant markets, 10% of the Block C price would create such a high opening bid requirement that the market may go unbid.”²¹ This statement contradicts Omnipoint’s earlier assertion that current C block licenses were only temporarily undervalued. It would appear that in its comments to the *Further Notice*, Omnipoint is acknowledging that the precipitous decline in C block license values, indeed, is real, and as such should affect the Commission’s current deliberations. The Commission certainly should consider Omnipoint’s new viewpoint as reflected in its statements about minimum bid price in its reconsideration of the portions of the *Second Report and Order* that were based on predictions of imminent increase in C block valuations and windfalls that might accrue to C block licensees.²²

Finally, we also note inconsistencies in AirGate’s position with regard to the Commission’s using net present value (NPV) calculations to determine the value of installment payment financing to bidders. Earlier in this proceeding, in the portion of this docket devoted to C block financing issues, AirGate vociferously opposed the Commission’s using meaningful NPV calculations to determine what a licensee really bid

Financial Markets Only Warrant Temporary Restructuring of Debt,” “Financial Markets are Improving Rapidly,” “No Justification for Permanent Restructuring at This Time,” “Zero Cash Payments for More Than One Year will Subsidize Large Resellers.”

²⁰ See Reply Comments of Omnipoint Corporation in WT Docket 97-82 (July 8, 1997) at 7.

²¹ Comments of Omnipoint at 6.

²² See, e.g., discussion of the Commission’s decision not to discount the face value of the C block prices. “To discount the amount of the principal, as has been suggested, would unfairly permit a windfall to the licensee electing this option.” *Second Report and Order* at para. 66.

for C block spectrum and thus what it should pre-pay under the prepayment option.²³ Moreover, the Commission appears to have based its decision in the *Second Report and Order* not to permit a discount of the face value of the C block prices in part on AirGate's assertions that it would not be appropriate for the Commission to permit licensees to pay the net present value of their license costs at a discount because it would be "denying licenses to bidders who expressed through their bids a willingness to pay more than a discounted bids. . . ." ²⁴ Yet, with regard to determining a minimum bid price, AirGate would have the Commission consider the NPV of all the C block bids to determine a minimum bid price. In its comments to this proceeding AirGate states that "[u]se of the C block "net bid", however, only accounts for the bidding discount and does not account for the "value" of the installment payments. In order to use the C block prices, the "net price" would have to be adjusted further to reduce the price to reflect the value bidders attached to the installment payment financing." ²⁵ Such a statement suggests that, contrary to earlier AirGate filings, AirGate has altered its opinion on the value of installment payments and now believes that *all* bidders discounted their bids to account for such value. A more trenchant analysis would suggest that AirGate finds it appropriate for the Commission to acknowledge the "value bidders attached to installment payment financing" or the NPV, so long as it is to AirGate's benefit.

²³ See e.g. Letter to Chairman Hundt and Commissioners Quello, Ness and Chong, WT Docket No. 97-82 (Sept. 22, 1997). "We encourage you to reject proposals to provide a discounted cash price at an interest rate that exceeds the interest rate on C block notes." *Id.* at 2.

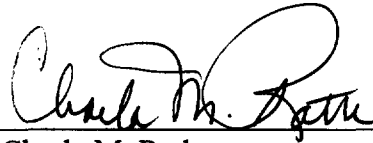
²⁴ See *Second Report and Order* at para. 62, citing AirGate Wireless *ex parte* letter, July 18, 1997 at 3.

²⁵ Comments of AirGate at 8.

VI. CONCLUSION

For the foregoing reasons, NextWave respectfully urges the Commission to adopt the changes to its auction rules as described herein.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Charla M. Rath", is written over a horizontal line.

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Certificate of Service

I, Kay Hawkins, hereby certify that on this 24th day of November, 1997, a copy of the attached Reply of NextWave Telecom Inc. was mailed via U.S. Post Office, first class postage prepaid, to the following:

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